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No. 99-687

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IN THE

Supreme Court of the United States

October Term, 1999

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,

Petitioners,

v

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF ERWIN CHEMERINSKY AND ARTHUR F. McEVOY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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2438

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

CERTIORARI IS WARRANTED IN LIGHT OF THE CONFLICT AND CONFUSION AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS CONCERNING THE REVIEW OF JURY-AWARDED PUNITIVE DAMAGES 3

A. Several Circuits Engage in *De Novo* Review of Whether the Jury's Award is Rationally Supportable on the Record, Consistent With the Traditional Standard of Review for Both Criminal and Civil Jury Verdicts .. 4

B. The Eleventh Circuit Improperly Defers to "Factual" Findings Made by District Courts in Reviewing Jury Verdicts, Carrying With It the Twin Risks of Undue Interference With Rational Jury Verdicts, and the Approval of Irrational Jury Verdicts 12

C. The Third Circuit Improperly Employs "Intensive Review," in Violation of Both Statutory and Seventh Amendment Strictures on the Scope of Federal Appellate Review of Jury Verdicts 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES: **PAGE:**

Air Safety, Inc. v. Roman Catholic Archbishop, 94 F.3d 1 (1st Cir. 1996) 6
Alvarez-Crespol v. Olavarria-Rivera, 994 F.2d 35 (1st Cir. 1993) .. 10
Axen v. American Home Prods. Corp ex rel Wyeth-Ayerst Labs., 974 P.2d 224, 318 (Or. App. 1999), *petition for cert. filed*, No. 99-784 (Nov. 4, 1999) 19
BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 11, 12
Brady v. Southern Ry., 320 U.S. 476 (1943) 9
Buntin v. Breathitt County Bd. of Educ., 134 F.3d 796 (6th Cir. 1998) 10
Burks v. United States, 437 U.S. 1 (1978) 9
Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184 (5th Cir. 1995) 10
Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997) 7
Davis v. United States Postal Serv., 142 F.3d 1334 (10th Cir. 1998) 10
Doby v. Decrescenzo, 171 F.3d 858 (3d Cir. 1999) 10
Favorito v. Pannell, 27 F.3d 716 (1st Cir. 1994) 10
Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 1, 17-18
Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., 112 F.3d 1119 (11th Cir. 1997) 10
Glazer v. Glazer, 374 F.2d 390 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967) 5-6
Goldhirsh Group v. Alpert, 107 F.3d 105 (2d Cir. 1997) 10
Gore v. United States, 357 U.S. 386 (1958) 11
Gremmels v. Tandy Corp., 120 F.3d 103 (8th Cir. 1997) 10
Gulf S. Medical & Surgical Inst. v. Aetna Life Ins. Co., 39 F.3d 520 (5th Cir. 1994), *cert. denied*, 516 U.S. 814 (1995) . 10
Harmelin v. Michigan, 501 U.S. 957 (1991) 11
Herrera v. Collins, 506 U.S. 390 (1993) 9
Honda Motor Co. v. Oberg, 512 U.S. 415 (1994). 2, 12
In re Merritt Logan, Inc., 901 F.2d 349 (3d Cir. 1990) 10
In re Wade, 969 F.2d 241 (7th Cir. 1992) 10
Jackson v. Virginia, 443 U.S. 307 (1979) 2, 4, 8-10, 15
Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259 (8th Cir.), *cert. denied*, 513 U.S. 989 (1994) 6, 7
Jamison Co. v. Westvaco Corp., 526 F.2d 922 (5th Cir. 1976) 6

CASES: **PAGE:**

Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999) 3, 13, 15
Kraus v. Sobel Corrugated Containers, Inc., 915 F.2d 227 (6th Cir. 1990) 10
Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996) 4
Leslie v. Doyle, 125 F.3d 1132 (7th Cir. 1997) 11
Lewis v. Jeffers, 497 U.S. 764 (1990) 10
Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986) . 9
Mejias-Quiros v. Maxxam Prop. Corp., 108 F.3d 425 (1st Cir. 1997) 5
Midland Banana & Tomato Co., Inc. v. United States Dep't of Agric., 104 F.3d 139 (8th Cir.), *cert. denied*, 522 U.S. 951 (1997) 7
Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340 (1913) 11
Pacific Mutual Life Ins. Co. v. Haslip, 400 U.S. 1 (1991) 12
Pavon v. Swift Transp. Co., 1999 WL 729132 (9th Cir. 1999) 5
Pierce v. Atchison T. & S.F. Ry., 110 F.3d 431 (7th Cir. 1997) 10
Pitts v. Michael Miller Car Rental, 942 F.2d 1067 (6th Cir. 1991 .. 10
Premier Bank v. Mosbacher, 959 F.2d 562 (5th Cir. 1992) 10
Rummel v. Estelle, 445 U.S. 263 (1980) 11
Sawyer v. Whitley, 505 U.S. 333 (1992) 10
Schlup v. Delo, 513 U.S. 298 (1995) 9, 14
Smith v. American Nat'l Red Cross, 1992 WL 357850 (4th Cir. 1992) 10
Solem v. Helm, 463 U.S. 277 (1983) 11
Solomon Dehydrating Co. v. Guyton, 294 F.2d 439 (8th Cir.), *cert. denied*, 369 U.S. 929 (1961) 5
Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915) ... 11
Strauss v. Stratojac Corp., 810 F.2d 679 (7th Cir. 1987) 6
St. Louis, I. Mt. & So. Ry. Co. v. Williams, 251 U.S. 63 (1919) 11
T. Harris Young & Assoc., Inc. v. Marquette Electronics, Inc., 931 F.2d 816 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991) ... 10
Taylor v. List, 880 F.2d 1040 (9th Cir. 1989) 10
This is Me, Inc. v. Taylor, 157 F.3d 139 (2d Cir. 1998) 10
Tibbs v. Florida, 457 U.S. 31 (1982) 9
Tuohey v. Chicago Park Dist., 148 F.3d 735 (7th Cir. 1998) 10
TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 12
United States v. Angulo-Lopez, 7 F.3d 1506 (10th Cir. 1993), *cert. denied*, 511 U.S. 1041 (1994) 11

CASES: **PAGE:**

United States v. Bajakajian, 524 U.S. 321 (1998) 11, 13
United States v. Big D Enterprises, Inc.,
184 F.3d 924 (8th Cir. 1999) 6-7
United States v. DeLuca, 137 F.3d 24 (1st Cir.), *cert. denied*,
119 S. Ct. 268 (1998) 11
United States v. Flowal, 163 F.3d 956 (6th Cir. 1998),
cert. denied, 119 S. Ct. 1509 (1999) 11
United States v. 121 Allen Place, 75 F.3d 118 (2d Cir. 1996) 10
United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997),
cert. denied, 523 U.S. 1012 (1998) 11
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) 11
Waymire v. Harris County, 86 F.3d 424 (5th Cir. 1996) 10
Weems v. United States, 217 U.S. 349 (1910) 11
Windham v. Merkle, 163 F.3d 1092 (9th Cir. 1998) 11
Wright v. West, 505 U.S. 277 (1992) 15

CONSTITUTIONAL PROVISIONS AND RULES:

U.S. Const. amend. VII 16-18
Judiciary Act of 1789, § 22, 1 Stat. 84-85 17
Fed. R. Civ. P. 52(a) 13-14

MISCELLANEOUS:

Brief of Federal Jurisdiction and Legal History Scholars
Akhil Reed Amar, et al., as *Amici Curiae* in Support
of Petitioner, in *Gasperni v. Center for Humanities*,
No. 95-719 (filed March 1, 1996) 14, 17-18
David G. Knibb, *Federal Court of*
Appeals Manual (4th ed. 2000) 10

INTEREST OF *AMICI CURIAE*

Amici curiae are law professors with expertise in the fields of federal jurisdiction, constitutional law and legal history, both of whom appeared as *amici* in the last major case in which this Court grappled with the proper scope of federal appellate review of jury damage awards, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Our qualifications are summarized in the Appendix.[1]

We have no interest in the outcome of the particular lawsuit at bar. We file this brief solely to alert the Court to the need to grant certiorari in this case to resolve the first question presented in the petition, which addresses the fundamental conflict and confusion among the federal circuit court of appeals regarding the proper scope of appellate review for jury-awarded punitive damages.[2]

SUMMARY OF ARGUMENT

Petitioners ask this Court to grant review in this case, first and foremost, to resolve a conflict that exists among the federal circuit courts of appeals regarding the nature of federal appellate review of punitive damage awards issued by juries. *See* Petition for Certiorari ("Pet.") at 13-20. Although we differ somewhat with petitioners on how the differing approaches among the circuits are most accurately described, and which circuits follow each approach, the circuit conflict discussed by petitioners is real and substantial. If anything, petitioners understate the importance of the circuit conflict, particularly with respect to the marked departure by some circuits, in the punitive damages context, from the standard of appellate review that has traditionally been used in criminal litigation and civil litigation alike where one party argues that the result reached by the jury is not rationally sustainable on the particular record of the case.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Although the other two questions presented in the petition may well be certworthy, we limit this *amicus* brief to an analysis of the first question.

Several circuits, when reviewing federal substantive due process attacks on punitive damage awards for "gross excessiveness," engage in a *de novo* review of whether the amount awarded by the jury is rational on the particular record. This review gives no particular deference to the district court's analysis of whether the award is constitutionally excessive, a matter that is treated as a classic "legal" issue, determined with the record evidence viewed in the light most favorable to the jury's verdict. This approach comports with the test adopted by this Court for appellate court review of criminal liability, *see, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and its close analogs used in appellate review of civil liability and of the severity of criminal and civil penalties. *Jackson*'s "rational factfinder" approach is appropriate for the appellate review of jury-awarded punitive damages, as this Court strongly implied in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

Other circuits, in articulating a standard of review for punitive damage awards, have departed from this traditional "rational factfinder" approach. Rather than examining the record *de novo* to determine whether the result reached by the jury was rational, the Eleventh Circuit uses a standard of review that defers to so-called "factual" findings made by district courts concerning the level of reprehensibility of the defendant's conduct and other key factors bearing on the ultimate legal issue of gross excessiveness. This approach creates twin risks. One is the risk of undue interference with rational jury verdicts (as district courts enjoy leeway to throw out verdicts that would be found rational on *de novo* review). The other is the risk of approval of irrational jury verdicts (as district courts enjoy leeway to uphold verdicts that would be found irrational on *de novo* review).

The Third Circuit, as indicated by the decision below, has likewise departed from the traditional standard of *de novo* review of a jury verdict's rationality in the context of reviewing punitive damage awards. The Third Circuit reads this Court's precedents as requiring appellate judges to engage in "intensive review" of punitive damage awards, and to use their own experience and judgment to ensure that only appropriate awards are upheld. This

expansive review standard violates statutory and constitutional strictures on the scope of federal appellate review of jury verdicts.

This Court should grant review to resolve the conflict among the federal circuit courts of appeals concerning the proper standard for reviewing federal substantive due process attacks on jury-awarded punitive damages. The proper standard of appellate review is an important and frequently recurring matter that should be addressed at the earliest available opportunity.

ARGUMENT

CERTIORARI IS WARRANTED IN LIGHT OF THE CONFLICT AND CONFUSION AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS CONCERNING THE REVIEW OF JURY-AWARDED PUNITIVE DAMAGES

The Eleventh Circuit recently suggested that the issue of the proper appellate standard of review for federal substantive due process attacks on jury-awarded punitive damages is an "issue of first impression" nationally. *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999). We disagree. Although the precise standard used by each circuit is difficult to define with absolute precision, and although some circuits have not specifically addressed this issue, it is plain that an important circuit conflict exists as to the standard of review. For the most part, the circuit conflict is ably summarized by petitioners, *see* Pet. at 13-20, although our view of several of the cases discussed by petitioners is somewhat different than theirs.

The three different approaches are these: (a) under the approach of several circuits, *de novo* review of what is termed a "legal" issue under a "rational factfinder" standard, which we believe is the correct approach; (b) under the Eleventh Circuit's approach, a nominally *de novo* review framework, coupled with deferential review of district court "factual" findings; and (c) under the Third Circuit's approach, an "intensive review" of the punitive damage award, conducted with the benefit of the appellate judges' own experience and judgment concerning what size award is

reasonable. We describe each approach and briefly summarize why we believe the first approach is the correct one.

A. Several Circuits Engage in *De Novo* Review of Whether the Jury's Award is Rationally Supportable on the Record, Consistent With the Traditional Standard of Review for Both Criminal and Civil Jury Verdicts

Petitioners identify two circuits, the Second and Ninth Circuits, as employing an "abuse of discretion" standard in reviewing constitutional excessiveness determinations by district courts with respect to jury-awarded punitive damages. Pet. at 14-15. As we read the cases cited by petitioners, the substance of the review standard is *de novo* review of whether the amount of punitive damages awarded is rationally supported by the record evidence, using a standard akin to the "rational factfinder" standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979), and related cases. Review of "abuse of discretion" is nominally involved because this is the label typically attached to review of a district court's ruling on a new trial motion. But there is no discretion actually accorded the district court. Rather, in these circuits, excessiveness is treated as a "legal" question, decided on the record with all legitimate factual inferences drawn in favor of the jury's result, and a district court perforce abuses its discretion in upholding a verdict that lacks rational support in the record.

This point is most clear with respect to *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), in which the Second Circuit explained that in reviewing a punitive damage award "for abuse of discretion," it decides a "question of law" concerning the "upper limit" supported by the record, to determine whether the amount of the award is "rational." *Id.* at 808-09 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996), and *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992)). It applied this standard to a prison beating case and held that the maximum punitive damage award supported by the record was $75,000 (as opposed to the $200,000 awarded by the jury and upheld by the district court). In doing so, the Second Circuit decided the federal substantive due process attack on the verdict based on a *de novo* review of the

inferences supported by the record, without any deference to the district court's view of the record. *Id.* at 809-13.

Similarly, in the Ninth Circuit case cited by petitioners, *Pavon v. Swift Transp. Co.*, 1999 WL 729132 (9th Cir. 1999), the court employed what it described as an "abuse of discretion" standard in upholding a $300,000 punitive damages verdict in an employment discrimination case, but its analysis made clear that a "rational factfinder" standard was actually at work. Thus, the court stated that the issue was whether the punitive damage award was excessive "as a matter of law," *id.* at *5, and in evaluating the record evidence supporting the award it focused on what "[t]he jury could have concluded" and what "the jury could have found." *Id.*

This use of the "abuse of discretion" label to describe what is in substance a review of the trial record under a "rational factfinder" standard, without any particular deference to the views of the district court concerning the trial record, is hardly new to federal appellate review of jury damage awards. For example, during the 1960s, when the existence of *any* federal appellate authority to review excessiveness claims was a matter of considerable dispute, *see, e.g.*, *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir.) (Blackmun, J.), *cert. denied*, 369 U.S. 929 (1961), the Fifth Circuit emphasized that the function of appellate review was to decide whether the district court had abused its discretion in upholding a verdict that was without rational support on the record. In *Glazer v. Glazer*, 374 F.2d 390 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967), the court struck down a $1.9 million compensatory award for breach of contract. In doing so, it stated that the district court had abused its discretion because "[t]he verdict was excessive *as a matter of law* in that it exceeds any *rational* appraisal or estimate of the damages that could be based upon the evidence before the jury." *Id.* at 413 (emphasis added). This linkage between the "abuse of discretion" label and the "rational factfinder" substance of the review of compensatory damages has persisted to this day.[3]

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[3] *See, e.g.*, *Mejias-Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 427-29 (1st Cir. 1997) (stating that under *Gasperini*'s abuse-of-discretion review

Besides the Second and Ninth Circuits in the decisions cited by petitioners, at least three other circuits appear to employ a "rational factfinder" standard of appellate review in assessing claims that a jury's award of punitive damages is grossly excessive. More than a decade ago the Seventh Circuit, in *Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987), reiterated settled precedent that it would find a punitive damage award excessive on appeal only if there is "'no rational connection between the evidence on the damages and the verdict,'" and in that case it upheld the punitive award on the finding that it did "not seem irrational." *Id.* at 686.

Likewise, the Eighth Circuit, in *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259 (8th Cir.), *cert. denied*, 513 U.S. 989 (1994), indicated that a punitive damage award should not be disturbed based on a "gross excessiveness" analysis unless the amount awarded "was so unrealistic that it showed irrational rather than reasonable jury behavior." *Id.* at 1266 (citation omitted). The Eighth Circuit reinstated in full the jury's $2.7 million punitive damage award that the district court had found excessive, based on its own conclusion, after a review of the record, that there was no indication that the award "could only have resulted from irrational jury behavior." *Id.* (citation omitted). The court applied *de novo* review of the jury's underlying award, under a "rational factfinder" standard, and there was no deference to the district court's analysis of the amount of the award. Recently, the Eighth Circuit explicitly held that in reviewing federal substantive due process challenges to punitive damage awards, it will "review the district court's conclusions de novo." *United States v. Big D Enterprises, Inc.*, 184

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standard, a district court's denial of a new trial on damages will be overturned "only if the damages awarded lack 'a rational basis in evidence,'" and concluding that the $25,000 award for medical expenses "lacked any rational basis" in the record) (citation omitted); *Air Safety, Inc. v. Roman Catholic Archbishop*, 94 F.3d 1, 4 (1st Cir. 1996) (stating that the proper scope of review "is narrow" and that "an abuse of discretion" cannot be found where "the jury award has a rational basis in evidence") (citation omitted); *Jamison Co. v. Westvaco Corp.*, 526 F.2d 922, 927 (5th Cir. 1976) (reaffirming *Glazer*).

F.3d 924, 932-33 (8th Cir. 1999).[4]

Finally, it appears that the Tenth Circuit also applies a *de novo* standard of review, under which no deference is owed to the district court and the sole issue is whether, drawing all legitimate factual inferences in favor of the jury's verdict, the amount of the punitive damage award is irrationally excessive. In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), the court stated that whether a given award violates federal substantive due process is "a federal constitutional issue" that is "one of constitutional fact that the appellate courts have the power to decide" based on their "review of the record."

The "rational factfinder" standard for reviewing the underlying jury verdict for rationality, with the record viewed in the light most favorable to the verdict, and with no particular deference to the trial judge, is of course a familiar one. It is the traditional review standard that this Court has articulated in criminal and civil litigation alike, both as a matter of constitutional law and in interpreting relevant procedural rules, where a litigant has an appeal of right from an adjudication that has visited upon him a deprivation of life, liberty or property. In reviewing the validity of both liability findings and penalty findings, appellate courts routinely engage in *de novo* review of the record to determine

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[4] Petitioners characterize the Eighth Circuit, by virtue of its *Big D* decision, as applying a standard of appellate review similar to the "intensive review" of both the jury's award and the district court's ruling used by the Third Circuit in its decision below. Pet. at 17. We disagree with this characterization. In our view, the Eighth Circuit's earlier decision in *Jacobs Mfg. Co.* demonstrates that the Eighth Circuit applies the standard used by the majority of circuits that have explicitly addressed the issue: *de novo* review of the district court's decision, applying a "rational factfinder" standard in deciding whether the record, viewed in the light most favorable to the verdict, rationally supports the jury's award. Further, the case cited in *Big D* to illustrate the nature of the *de novo* review being used, *see* 184 F.3d at 933, confirms the limited nature of this review. In that case, *Midland Banana & Tomato Co., Inc. v. United States Dep't of Agric.*, 104 F.3d 139, 142 (8th Cir.), *cert. denied*, 522 U.S. 951 (1997), the Eighth Circuit relied on the rule that "[w]e review federal constitutional questions de novo."

whether the deprivation is rationally sustainable on the record.

We briefly address this traditional review standard to highlight the broad base of support for the approach that most circuits have taken in assessing federal substantive due process challenges to punitive damage awards, and to highlight the importance of this Court granting review in this case to bring this area of the law into line with the traditional approach.

Criminal Liability. In criminal litigation, it is well settled that where a defendant tests the adequacy of the evidence introduced at trial, the proper test on appellate review (and on habeas review of state court proceedings) is whether "a rational factfinder" could have arrived at the result reached by the jury, in light of the underlying law, the facts, and the standard of proof. *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979). In *Jackson*, the Court stated that "[t]his familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319.

In *Jackson*, this Court went out of its way to emphasize that the "rational factfinder" test is an objective one that focuses on the corpus of evidence that was before the jury, not on any individual aspects of how the jury performed its duty, or how the trial judge viewed the case. The standard, the Court stated, "does not permit a court to make its own subjective determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached" based on "scrutiny of the reasoning process actually used by the factfinder — if known." *Id.* at 319-20 n.13. This Court has consistently emphasized the narrow, objective character of the "rational factfinder" test in subsequent decisions involving the review of jury verdicts in criminal cases.[5]

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[5] Even before *Jackson*, in explicating the standard for reviewing evidentiary sufficiency objections in federal court, the Court stated that "[e]ven the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it

Civil Liability. *Jackson* involved the review of evidentiary sufficiency to sustain a criminal conviction. But a close variant of the *Jackson* standard applies as well to appellate review of liability determinations in federal court civil litigation. Here, too, there is no deference to district court determinations. This Court articulated the general approach decades ago as follows: "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict." *Brady v. Southern Ry.*, 320 U.S. 476, 479-80 (1943).

This Court explicitly introduced *Jackson*'s "rational factfinder" language in the summary judgment context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in stating that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" emphasizing that the inferences that may be drawn from the facts must be "'viewed in the light most favorable to'" the nonmovant. *Id.* at 587 (citations omitted). In civil litigation, the federal appellate courts now routinely refer to the "rationality" of a finding of liability when they engage in *de novo* review of the

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judges the merits of a motion for acquittal," and that "[o]bviously a federal appellate court applies no higher a standard." *Burks v. United States*, 437 U.S. 1, 16 (1978). In *Tibbs v. Florida*, 457 U.S. 31 (1982), the Court stated that the *Jackson* test "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt," so that "[t]he Due Process Clause . . . sets a lower limit on an appellate court's definition of evidentiary sufficiency," but it emphasized that "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Id.* at 45 & n.21 (quoting *Jackson*, 443 U.S. at 319). This aspect of *Jackson* was also emphasized in *Herrera v. Collins*, 506 U.S. 390, 401-02 (1993). Most recently, in *Schlup v. Delo*, 513 U.S. 298, 330 (1995), the Court emphasized the objective nature of the *Jackson* "rational factfinder" test as follows: "Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not."

corpus of record evidence in reviewing summary judgment and JMOL rulings.[6]

Criminal Penalties. The "rational factfinder" standard also appears at the penalty stage in criminal proceedings. For example, in the capital punishment context, in deciding whether the record supports a finding of a particular death-qualifying "aggravating circumstance," the "appropriate standard of review is the 'rational factfinder' standard established in *Jackson*." *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990). *See also id.* at 781-83; *Sawyer v. Whitley*, 505 U.S. 333, 339-41, 345-47 & n.14 (1992) (citing *Jackson* in reference to the "innocent of death" doctrine in the context of successive habeas claims). In a related vein, in reviewing whether

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[6] *See* David G. Knibb, *Federal Court of Appeals Manual* § 30.2, at 526 (4th ed. 2000). An electronic search of decisions in the past decade reveals that at least ten of the twelve federal circuit courts of appeals employ the "rational factfinder" test in their *de novo* review of summary judgment and/or JMOL rulings. *See, e.g.*, *Doby v. Decrescenzo*, 171 F.3d 858, 873-74 (3d Cir. 1999); *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998); *Tuohey v. Chicago Park Dist.*, 148 F.3d 735, 740 (7th Cir. 1998); *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998); *Gremmels v. Tandy Corp.*, 120 F.3d 103, 105 (8th Cir. 1997); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1121 (11th Cir. 1997); *Pierce v. Atchison T. & S.F. Ry.*, 110 F.3d 431, 438 (7th Cir. 1997); *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 107-08 (2d Cir. 1997); *Waymire v. Harris County*, 86 F.3d 424, 428 (5th Cir. 1996); *United States v. 121 Allen Place*, 75 F.3d 118, 120-21 (2d Cir. 1996); *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 187 (5th Cir. 1995); *Gulf South Medical & Surgical Inst. v. Aetna Life Ins. Co.*, 39 F.3d 520, 521 (5th Cir. 1994), *cert. denied*, 516 U.S. 814 (1995); *Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994); *Alvarez-Crespo v. Olavarria-Rivera*, 994 F.2d 35, 36 (1st Cir. 1993); *Smith v. American Nat'l Red Cross*, 1992 WL 357850, at *2 (4th Cir. 1992); *In re Wade*, 969 F.2d 241, 248 (7th Cir. 1992); *Premier Bank v. Mosbacher*, 959 F.2d 562, 566 (5th Cir. 1992); *Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1069-70 (6th Cir. 1991); *T. Harris Young & Assocs., Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 821, 828 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *In re Merritt Logan, Inc.*, 901 F.2d 349, 366 (3d Cir. 1990); *Taylor v. List*, 880 F.2d 1040, 1044-45 (9th Cir. 1989).

particular criminal sentences are in violation of the Eighth Amendment's ban on "cruel and unusual punishments," this Court treats the issue as "legal" in nature, reviewable *de novo*, with no particular deference to the trial court's view of the matter. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 985-90, 994-96 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.); *id.* at 996, 1001-08 (opinion of Kennedy, J., joined by O'Connor and Souter, JJ.); *Solem v. Helm*, 463 U.S. 277, 283, 290-300, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 275-82 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958); *Weems v. United States*, 217 U.S. 349, 362-68, 377, 380-82 (1910).[7] The Court has adopted a similar review standard with respect to criminal forfeitures. *United States v. Bajakajian*, 524 U.S. 321, 336-37 n.10 (1998).

Civil Penalties. In reviewing whether particular instances of civil fines are constitutionally excessive, this Court has likewise treated the issue as "legal" in nature and reviewable *de novo*, with no particular deference to the views of lower courts or administrative agencies concerning the ultimate constitutional issue of excessiveness. *See, e.g., St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-51 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909). This Court relied on these decisions in explicating the standard for reviewing federal substantive due process attacks on punitive damage awards. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-

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[7] The federal circuit courts of appeal have understood that the review of Eighth Amendment challenges is to be conducted *de novo*. *See, e.g., United States v. Flowal*, 163 F.3d 956, 963 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1509 (1999); *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998); *United States v. DeLuca*, 137 F.3d 24, 40 n.19 (1st Cir.), *cert. denied*, 119 S. Ct. 268 (1998); *Leslie v. Doyle*, 125 F.3d 1132, 1134 (7th Cir. 1997); *United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, 511 U.S. 1041 (1994).

54, 458 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co. v. Haslip*, 400 U.S. 1, 12, 18 (1991).

Punitive Damages. The "rational factfinder" standard that is employed by most of the federal circuit courts of appeal that have articulated a review standard likewise finds solid support in this Court's decisions during the past decade addressing federal substantive due process challenges to punitive damage awards. In all three cases, the Court treated the "gross excessiveness" issue as a "legal" one, reviewable *de novo* with the record viewed in the light most favorable to the jury's verdict, with no particular deference to the views of the district court. *See BMW v. Gore*, 517 U.S. at 574-86; *TXO*, 509 U.S. at 458-62 (plurality opinion); *Haslip*, 400 U.S. at 18-24. Further, in a decision holding that some degree of judicial review of the size of punitive damage awards is required by the Due Process Clause of the Fourteenth Amendment, this Court strongly implied that *Jackson*'s "rational factfinder" approach is the appropriate review standard for "gross excessiveness" claims. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 & n.10 (1994) (citing *Jackson*).

B. The Eleventh Circuit Improperly Defers to "Factual" Findings Made by District Courts in Reviewing Jury Verdicts, Carrying With It the Twin Risks of Undue Interference With Rational Jury Verdicts, and the Approval of Irrational Jury Verdicts

We agree with petitioners that the Eleventh Circuit applies a standard for appellate review of punitive damage awards that is at odds that the standard followed in other circuits. *See* Pet. at 15-16. However, we differ from petitioners in our description of how this standard operates. By and large, the Eleventh Circuit appears to follow the "rational factfinder" approach used by most circuits, treating the issue of whether a particular punitive damage award violates federal substantive due process as a "legal" issue subject to *de novo* review. But unlike other circuits, the Eleventh Circuit disclaims any "abuse of discretion" label, thus making clearer than other circuits that, in general, a *de novo* review standard applies. Thus, in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320

(11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999), the court stated that under this Court's decisions

> there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture. The abuse of discretion standard is inapplicable where no discretion may be exercised.
>
> The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law *de novo*.

Id. at 1334.

Up to this point, the Eleventh Circuit's *Johansen* decision is straightforward, with the court endorsing *de novo* review of a jury verdict awarding punitive damages, conducted through a review of the underlying record viewed in the light most favorable to the verdict, without deference to the district court. But the court then adds a caveat that creates a curious hybrid standard of review: rather than deferring on factual matters to the *factfinder* on the case, that is, the jury, the Eleventh Circuit defers to the posttrial analysis of the *district court* that reviewed the jury's verdict, "accept[ing] the district court's findings of fact unless they are clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a). *Id.*

We are aware of no authority for such a standard of review. The only case cited by the Eleventh Circuit on this point is this Court's decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), in which the Court conducted an excessiveness analysis of a criminal forfeiture imposed by a district court after a bench trial and confirmed the basic rule that although excessiveness determinations are "legal" issues reviewed *de novo*, the evidence must be viewed in the light most favorable to the result reached by the factfinder — there, the district court that conducted the bench trial and issued Rule 52(a) factual findings. *Id.* at 336-37 n.10. We are at a loss to understand how *Bajakajian* could be construed to support the proposition that if a district court issues an opinion on a posttrial motion finding that a jury's award of punitive damages violates federal substantive due process, on appeal there will no longer be "rational factfinder" review of whether the record before

the jury supports the ultimate verdict, but instead the district court's opinion will be given the status of Rule 52(a) factual findings — thereby rendering irrelevant the fact that it is a jury verdict, not a bench trial finding, undergoing review.

Apart from the conceptual inappropriateness of the Eleventh Circuit's mixing of two separate appellate review standards — that used to assess the rationality of a jury's verdict, and that used to assess the validity of explicit factual findings made at the conclusion of a bench trial — this approach creates twin risks of aberrant results. Under the "rational factfinder" review standard used by most circuits, either the jury's punitive damage award is rational, in which case it is upheld, or it is not rational, in which case it is struck down. *Cf. Schlup v. Delo*, 513 U.S. 298, 330 (1995) (stating that under the *Jackson* test, the question of whether the jury's verdict could have been reached by a rational factfinder "requires a binary response"). Under this approach, there is no risk of undue interference with jury verdicts (as *only* irrational jury verdicts are struck down) and no risk of the approval of irrational jury verdicts (as *all* irrational jury verdicts are struck down).[8]

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[8] We hasten to add that this *de novo* standard of review, which ensures that all irrational verdicts are struck down on federal substantive due process grounds, but that no rational verdicts are struck down on such grounds, is relevant in only a tiny percentage of cases, and that this standard does not place trial judges in a legal straightjacket. The vast bulk of jury verdicts raise no colorable excessiveness concern. Further, as a practical matter, most verdicts that are constitutionally problematic are reduced by trial judges in the exercise of an entirely different source of power to control aberrant verdicts. Throughout our nation's history, federal trial judges have enjoyed broad authority to grant new trials, both as to liability and damages, through the exercise of their power to sit as the "thirteenth juror," weighing the evidence to decide whether a new trial is in the interests of justice. As we have argued at length elsewhere, this power of the trial judge to alter jury verdicts based on a weight-of-the-evidence analysis is exclusive to trial judges and is effectively immune from control by appellate courts. *See* Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner, in *Gasperni v. Center for Humanities*, No. 95-719 (filed March 1, 1996) (hereinafter "*Gasperni Amicus* Br.").

The Eleventh Circuit's approach creates a risk of approval of irrational jury verdicts: even where the appellate court on *de novo* review would conclude that the result reached by the jury is irrational and hence in violation of federal substantive due process, the verdict can nonetheless be upheld on the basis of factual findings made by the district court, to which the appellate court will defer. This approach also creates the opposite risk of undue interference with rational jury verdicts: even where the appellate court on *de novo* review would conclude that the result reached by the jury is rational, the district court can make factual findings striking down the verdict, to which the appellate court will also defer.

Even in the context of federal court habeas review of the sufficiency of the evidence to support state court convictions, this Court has not permitted anomalous results such as these. In *Wright v. West*, 505 U.S. 277 (1992), the Court turned back a request that federal courts give sufficiency-of-the-evidence findings of state trial judges deferential as opposed to plenary review.[9] We see no basis for a different rule on direct appellate review in federal court of the rationality of the result of civil litigation, as this Court's decisions in the summary judgment and JMOL contexts illustrate. Thus, apart from the absence of any jurisprudential pedigree for the Eleventh Circuit's hybrid review standard, the use of the standard raises troublesome concerns of practicality and fairness that merit consideration in the context of the instant case. (The petition for certiorari in *Johansen*, which this Court denied, did not raise any the standard-of-review issue. *See* Pet. at 16 n.9.)

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[9] *See* 505 U.S. at 297, 303, 305 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring in the judgment) (endorsing traditional *de novo* review standard and affirming based on *de novo* review of petitioner's *Jackson* claim); *id.* at 306, 309 (Kennedy, J., concurring in the judgment) (same); *id.* at 297 (White, J., concurring in the judgment) (affirming based on *de novo* review of *Jackson* claim); *id.* at 287-97 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.) (noting arguments for using, at least in some contexts, a deferential review standard, but affirming on ground that petitioner's *Jackson* claim failed even on *de novo* review); *id.* at 310 & n.1 (Souter, J., concurring in the judgment) (affirming on the ground that petitioner's habeas claim was time barred).

C. The Third Circuit Improperly Employs "Intensive Review," in Violation of Both Statutory and Seventh Amendment Strictures on the Scope of Federal Appellate Review of Jury Verdicts

The appellate review standard applied by the Third Circuit in its decision below is even more aberrant and in conflict with fundamental strictures on the scope of appellate review than the Eleventh Circuit's approach. Unlike most circuits, which defer to juries under the "rational factfinder" standard, and unlike the Eleventh Circuit, which defers to district courts on factual aspects of posttrial rulings that are not "clearly erroneous," the Third Circuit exhibits little if any deference to *either* the jury *or* the district court in evaluating federal substantive due process attacks on jury-awarded punitive damages. According to the Third Circuit, it has chosen to take on what it terms a "challenging" role: "[t]he role of gatekeeper" over sizable punitive damage awards. Pet. App. 3a. Stating that this "is not an enviable task," the court reports that it has "searched vainly in the case law for a formula" with which to pass on such attacks but has "not found one." Pet. App. 41a. In deciding the upper limit of punitive damages in each case, the court indicates, each of its panels "must rely on its combined experience and judgment" and, when its members disagree, "they must seek an accommodation among their views" concerning what is "the proper, reasonable punitive damages award." *Id.* Such "intensive review" of punitive damage awards, the court believes, is required by this Court's jurisprudence. Pet. App. 44a.

We agree with petitioners that the standard of review that has been adopted by the Third Circuit is in conflict with the standard used in other circuits and finds no support in this Court's jurisprudence, and that certiorari should be granted in this case to set forth a uniform standard of review. *See* Pet. at 17-20. Further, in evaluating the Third Circuit's standard, we urge the Court to consider the way in which this standard violates fundamental strictures on the scope of federal appellate review of jury verdicts.

Based on the Third Circuit's description of its standard of review and on the way it applied that standard to the facts of the case below, *see* Pet. App. 38a-41a, it is apparent that the Third

Circuit engaged in weight-of-the-evidence review — perhaps even *de novo* review — of the *factual* issue of what is the "proper" or "reasonable" amount of punitive damages in this case. As we and others explained in an *amicus* brief filed in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this form of federal appellate review is entirely improper. *See Gasperini Amicus* Br., *supra* note 8. Appellate weight-of-the-evidence or *de novo* review of factual issues has been barred by statute since the enactment of the Judiciary Act of 1789, § 22, 1 Stat. 84-85, to the present day, *id.* at 22-24, a statutory structure which is both compatible with basic fairness to litigants and which promotes efficiency. *Id.* at 24-30. Even more fundamentally, this sort of "intensive review" practiced by the Third Circuit has been barred by the Re-Examination Clause of the Seventh Amendment since the enactment of the Bill of Rights in 1791. *Id.* at 4-21. As we have argued previously:

> This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Id. at 19 (quoting *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887), and citing *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915)).

In *Gasperini*, the Members of this Court disagreed over whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages (that is, although not a preset cap, what amounted to a "soft cap" dependent in part on the facts of the case) that could be applied by the district court, followed by appellate review for "legal" error, under an abuse-of-discretion standard. But as we read the *Gasperini* opinions, no Member of the Court disputed that the Seventh Amendment bars a federal

appellate court from engaging in weight-of-the-evidence review.[10] The dispute in *Gasperini* was simply over whether the New York statute should be viewed by federal district courts as imposing a "soft cap," with federal appellate courts properly policing the outer boundaries of district court rulings applying this cap, or whether instead such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing of jury verdicts.

Under *Gasperini*, we submit, the invalidity under the Seventh Amendment of the "intensive review" standard used by the Third Circuit is clear. By contrast, it would appear, especially in light of *Gasperini*, that the "rational factfinder" standard of review for punitive damages followed by most circuits is compatible with the Seventh Amendment. Thus, in our *amicus* brief in *Gasperini* we confined our argument to a demonstration of the impermissibility of any weight-of-the-evidence review in civil cases by federal appellate courts, raising no question as to "whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process 'reasonableness' standard." *Gasperni Amicus* Br. at 20 & n.19 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), and *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.)).

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[10] *See Gasperini*, 518 U.S. at 434-38 (opinion of the Court) (viewing New York statute as imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis and therefore reviewable on appeal as a matter of law); *id.* at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

CONCLUSION

This Court should grant the petition for certiorari to resolve the important conflict in the circuits over the proper standard of review for federal substantive due process attacks on jury-awarded punitive damages.[11]

Respectfully submitted.

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[11] Although we have not canvassed the case law regarding the appellate review standards being used in the state courts, it appears that the approach followed in state courts is far from uniform. Petitioners cite decisions from Kentucky and Wisconsin indicating that the appellate courts of those states view the issue of whether a punitive damage award is constitutionally excessive as factual in nature, with trial court decisions reviewable only under the "clearly erroneous" or "abuse of discretion" standard for factual issues. Pet. at 15 n.8 (citing *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 415 (Ky. 1998); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 81 (Wis. 1996)). By contrast, in a recent decision upholding a punitive damage award against an objection that the trial court had not issued findings of fact and conclusions of law in rejecting defendant's federal constitutional challenge, an Oregon appellate court answered the objection by stating that "because the constitutional issue is purely a legal issue, the trial court's reasoning in support of its decision, while helpful, has no direct bearing on our review." *Axen v. American Home Prods. Corp ex rel. Wyeth-Ayerst Labs.*, 974 P.2d 224, 241 (Or. App. 1999) (citation omitted), *petition for cert. filed*, No. 99-784 (Nov. 4, 1999).

APPENDIX

QUALIFICATIONS OF *AMICI CURIAE*

Erwin Chemerinsky is the Legion Lex Professor of Law at the University of Southern California Law Center, where he teaches federal courts, civil procedure, and constitutional law. His publications include *Constitutional Law: Principles and Policies* (Little, Brown & Co., 1997); *Federal Jurisdiction* (Little, Brown & Co., 2d ed. 1994) and *Interpreting the Constitution* (Praeger, 1987), as well as numerous articles in law reviews and other scholarly journals.

Arthur F. McEvoy III holds a joint appointment as Professor of Law and Professor of History at the University of Wisconsin, Madison, and has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a Research Fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was counsel of record on an *amicus* brief filed by legal historians on that issue which was cited by this Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994).